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IN THE
COURT OF APPEALS OF INDIANA

DOUG H. WILSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0905-CR-427
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0806-FC-51

November 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Doug H. Wilson appeals his aggregate ten-year sentence for criminal confinement, domestic battery, possession of marijuana while having a prior conviction, and being a habitual offender. Wilson contends the trial court abused its discretion in rejecting his proffered mitigating factor that the crimes resulted from circumstances unlikely to recur. He also contends that his sentence is inappropriate. Because we conclude that the trial court did not abuse its discretion in rejecting Wilson's proffered mitigating factor and because we are not persuaded that Wilson's aggregate ten-year sentence is inappropriate, we affirm.

Facts and Procedural History[1]

Wilson met Melissa Morris around November 2007 and later moved into her residence on Greenbush Street in Lafayette. Morris discovered that Wilson was using cocaine at a point in the relationship when he became physically abusive toward her. After they came to an understanding that Wilson would stop using drugs, the relationship improved until June 15, 2008, when he again became physically abusive towards Morris.

The next day, Morris contacted Carrie Widgery and told her that she wanted to move out before Wilson returned home from work. Widgery picked up Morris and her fifteen-month-old son and brought them back to her residence, where they stayed until leaving to pick up Widgery's boyfriend from work. Widgery and her six- and eight-year-old daughters and Morris and her fifteen-month-old son were in Widgery's vehicle driving in the Lafayette-West Lafayette area when Widgery noticed Wilson pursuing her

[1] Because the factual basis for the crimes does not provide much detail, we recite the facts as provided by the probable cause affidavit in the record as both parties' briefs refer to it in their statement of facts sections.

vehicle. Wilson cut in front of her vehicle multiple times. As Widgery turned onto Happy Hollow Road in West Lafayette, witness Greg Brown saw Wilson's vehicle ram the driver's side of Widgery's vehicle and force it off the road and onto an embankment. The rear driver's side passenger door, where Widgery's eight-year-old daughter was seated, and the front driver's side door and mirror sustained heavy damage. Widgery was able to maneuver around Wilson's vehicle and continue on Happy Hollow Road. Widgery's vehicle became disabled at some point, and Brown said he rounded a curve and found Wilson's vehicle pulled in front of Widgery's vehicle on the shoulder. Wilson then stepped out of his vehicle and pulled Morris from Widgery's vehicle despite the fact that she told him to stop and that she did not want to leave with him. He dragged Morris for a short distance and then picked her up and forced her into his vehicle, causing abrasions and bruises on her arms. He grabbed her left arm to prevent her from escaping from his vehicle as he drove away and "threatened to kill her if he went to jail over this." Appellant's App. p. 43. He took her back to their residence on Greenbush Street where they remained until officers arrived and took him into custody.

On June 20, 2008, the State charged Wilson with nine counts, including criminal confinement as a Class C felony[2] (Count I) and domestic battery as a Class D felony[3] (Count V). A few days later, the State filed additional counts, including possession of marijuana while having a prior conviction as a Class D felony[4] (Count X) and being a

[2] Ind. Code § 35-42-3-3(b)(1)(B).

[3] Ind. Code § 35-42-2-1.3(b)(2).

[4] Ind. Code § 35-48-4-11(1)(ii).

habitual offender[5] (Count XI). In November 2008 Wilson pled guilty to Counts I, V, X, and XI pursuant to a written plea agreement, and in exchange, the State dismissed the remaining charges. The plea agreement provided, among other things, that the executed portion of Wilson's sentence would be no less than seven years and no more than twelve years.

At the sentencing hearing in March 2009, one of Wilson's proffered mitigating factors was that the crimes resulted from circumstances unlikely to recur:

> I'd like t[he] Court to consider that this was an emotionally driven crime and it wasn't something that Doug had planned out. It was certainly reckless and it [b]y no means excuses his actions but Doug didn't get into the --- his vehicle that day to hunt Melissa down and commit the crimes that he committed. He was on his way to a friend's house that his live-in girlfriend had just left him. He was --- he had a lot of emotions going on and if [b]y some bad circumstance she happened to be at that intersection that day and he just kind of lost it due to the emotional state he was in. If he doesn't get to that intersection at the same time that she's there then he makes it to his friend's house and cools down and we're not here discussing what to do with the next seven to twelve years of Doug's life. . . . Doug does have a history of criminal activity, however it's substance abuse related and it's not suggested that anything of this nature would ever likely occur again.

Sent. Tr. p. 5-7. The court addressed this proffered mitigator as follows:

> The --- facts as set forth in the probable cause affidavit do not suggest that this is a crime of passion because the indication --- the testimony of the victim or the statement of the victim was that she had been beaten by the defendant the previous day and now he's back not only --- now he's back crashing his car into hers. I have no doubt that he was angry but it's --- it's a --- it's more of a pattern of domestic abuse th[a]n a question of uncontrollable anger. It all points to trying to control and --- somebody else as a, you know, intentional and persistent course of conduct.

[5] Ind. Code § 35-50-2-8.

Id. at 11-12. The court then identified as aggravators Wilson's criminal and delinquent history, the presence of young children at the crime of violence, and Wilson's past probation violations. As mitigators, the court noted Wilson's guilty plea and taking responsibility for his crime, his remorse, his good employment record, and his timely payment of child support. Finding that the aggravators outweighed the mitigators, the court sentenced Wilson to six years for criminal confinement, three years for domestic battery, three years for possession of marijuana while having a prior conviction, all to be served concurrently, and enhanced the criminal confinement conviction by four years for being a habitual offender, for an aggregate sentence of ten years. Wilson now appeals.

Discussion and Decision

Wilson raises two issues on appeal. First, he contends that the trial court abused its discretion in sentencing him when it rejected his proffered mitigating factor that the crimes resulted from circumstances unlikely to recur. Second, he contends that his sentence is inappropriate.

I. Abuse of Discretion

Wilson contends that the trial court abused its discretion in sentencing him when it rejected his proffered mitigating factor that the crimes resulted from circumstances unlikely to recur. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be

drawn therefrom. *Id.* We review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the relative weight given to these reasons. *Id.* at 491. When an allegation is made that the trial court failed to find a mitigating factor, the defendant is required to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.* at 493. However, a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000).

We first point out that although Wilson contends that the trial court abused its discretion in rejecting his proffered mitigating factor that the crimes resulted from circumstances unlikely to recur, he folds into this argument that his actions were more attributable to his mental illness and substance abuse than to a pattern of behavior designed to control Morris. Appellant's Br. p. 5-7. Generally, if a defendant fails to advance a mitigating circumstance at sentencing, we presume that the circumstance is not significant, and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal. *Sargent v. State*, 875 N.E.2d 762, 770 (Ind. Ct. App. 2007). We thus conclude that to the extent that Wilson proffers his substance abuse and mental illness as mitigators on appeal, those considerations are waived.

Waiver nothwithstanding, given our preference for resolving a case on its merits, we review Wilson's proffered mitigating factor that the crimes resulted from circumstances unlikely to occur along with these waived claims.

A. Circumstances Unlikely to Occur

Wilson contends that the trial court abused its discretion in rejecting his proffered mitigating factor that the crimes resulted from circumstances unlikely to recur. Before imposing Wilson's sentence, the trial court noted Morris's statement to the police that "she had been beaten by [Wilson]" the day before the crimes and that Wilson's actions appeared to be "more of a pattern of domestic abuse th[a]n a question of uncontrollable anger." Sent. Tr. p. 12. Given the fact that Wilson was physically abusive toward Morris the day before the crimes, we cannot say that the trial court abused its discretion by finding that the crimes indicated a pattern domestic abuse rather than being the result of circumstances unlikely to occur.

B. Substance Abuse

To the extent that Wilson incorporates his substance abuse into his abuse of discretion argument, we examine whether his substance abuse is a mitigating circumstance. While we have recognized that a history of substance abuse may be a mitigating circumstance, *Field v. State*, 843 N.E.2d 1008, 1012 (Ind. Ct. App. 2006), *trans. denied*, we have held that when a defendant is aware of a substance abuse problem but has not taken appropriate steps to treat it, the trial court does not abuse its discretion by rejecting it as a mitigating circumstance. *Bryant v. State*, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004), *trans. denied*. Further, a history of substance abuse is sometimes found by trial courts to be an aggravator, not a mitigator. *E.g.*, *Roney v. State*, 872 N.E.2d 192, 199 (Ind. Ct. App. 2007), *trans. denied*.

Wilson's Pre-Sentence Investigation Report outlines an extensive history of drug abuse starting at the age of thirteen and including the use of marijuana, hashish, cocaine,

crack cocaine, methamphetamine, L.S.D., mushrooms, ecstasy, inhalants, and Percocet.[6] Although we applaud the fact that Wilson has completed two thirty-day substance abuse programs,[7] one in 2002 and the other in 2004, we also observe that he completed only seven weeks of a one-year substance abuse program in 2004. Most significantly, we note that despite his participation in these programs, he has continued his abuse of drugs. We are not persuaded that Wilson's substance abuse is a mitigating circumstance.

C. Mental Illness

To the extent that Wilson incorporates his mental illness into his abuse of discretion argument, we examine whether his mental illness is a mitigating circumstance. A defendant's mental illness may be a valid mitigating circumstance. *See Anglemyer*, 868 N.E.2d at 493. The following considerations are relevant when the trial court determines the significance of a defendant's mental illness for sentencing: (1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime. *Ankney v. State*, 825 N.E.2d 965, 973 (Ind. Ct. App. 2005) (citing *Weeks v. State*, 697 N.E.2d 28, 30 (Ind. 1998)), *trans. denied*.

[6] Although the probation officer's report states that Wilson's history of drug abuse began at the age of thirteen, we note that the psychological and substance abuse evaluation included in the PSI indicates that Wilson's drug use started at the age of eleven. This discrepancy is not determinative.

[7] Although the probation officer's report states that Wilson completed two thirty-day substance abuse programs, we note that the psychological and substance abuse evaluation included in the PSI indicates that Wilson completed five thirty-day substance abuse programs. This discrepancy is not determinative.

Turning to these factors, we observe that the record reflects that Wilson's mental illness stems largely from his own conduct, that is, substance abuse. A psychological and substance abuse evaluation performed by Dr. Jeffrey Wendt included the following:

> [I]t is my opinion that [Wilson] suffers from symptoms of a mood disorder characterized by depression and hypomania. However, these symptoms appear to have manifested in the context of chronic substance dependence, and are secondary to his addiction. His symptoms persist during periods of sobriety, such as his current incarceration. However, his substance use goes back to age 11 and appears to pre-date his mental health concerns. Therefore, it is unclear whether his mood disorder constitutes an independent psychiatric condition, or if it is secondary to his addiction. Regardless, it is my opinion that his mood disorder is not severe, and that he can achieve mood stability without medication if he remains sober, particularly during any period of incarceration.
>
> * * * * *
>
> It is my opinion that his chronic substance abuse and dependence has gradually eroded his capacity for self-control over the years. In addition, the symptoms of his mood disorder (either Bipolar II Disorder or Substance Induced Mood Disorder), particularly irritability and racing thoughts, likely contributed to his behavior during the time in question.

PSI p. 14-15. As for the extent of Wilson's inability to control his behavior due to his mental illness, Dr. Wendt's opinion is that Wilson's loss of self-control is due to his substance abuse. As for Wilson's overall limitations on functioning, Dr. Wendt's evaluation indicates that Wilson said that "his substance abuse had led to professional difficulties and impaired his capacity to work in the past." *Id.* at 13. For both of these factors, we note that Wilson's substance abuse has been the basis of his problems, not his mental illness.

As for the duration of his mental illness, Wilson reported in his PSI that he was diagnosed with bipolar disorder when he was fifteen, for which he underwent inpatient

treatment for three months. He was diagnosed with bipolar disorder and rapid cycling depression in 2004 or 2005 for which an unknown medication was prescribed. He took the medication for five months "before deciding that it wasn't working." *Id.* at 6. While we acknowledge his long-standing mental illness, the duration of Wilson's mental health problems has put him on notice that he needs to accept and comply with treatment. He has not, however, followed through with treatment despite his awareness that his mental health has negatively impacted numerous areas of his life.

Finally, as to the extent of any nexus between Wilson's mental illness and the commission of the crimes, Dr. Wendt's opinion was that symptoms of his mood disorder contributed to his behavior during the crimes. However, to the extent that Wilson's mental condition was affected by his voluntary act of abusing drugs, we do not find this factor significantly mitigating, *see Krempetz v. State*, 872 N.E.2d 605, 615 (Ind. 2007) (finding no error in the trial court's determination that an impaired mental condition mitigator should be given minimal weight, where the determination was based in part on the fact that the defendant "self medicated with marijuana and other illegal drugs and thus any mental condition could have been self induced"), especially given his long-time awareness of his problems and his failure to follow through with treatment. We are not persuaded that Wilson's mental illness is a significant mitigating circumstance.

II. Appropriateness of the Sentence

Wilson also contends that his aggregate ten-year sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate

review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The defendant has the burden of persuading us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

As for the nature of the offenses, Wilson used his vehicle to chase after Widgery's vehicle. Widgery, Morris, Morris's fifteen-month-old son, and Widgery's six- and eight-year-old daughters were in her vehicle. Wilson cut in front of Widgery's vehicle multiple times and then crashed into the driver's side of Widgery's vehicle, forcing it off the road and onto an embankment. The rear driver's side passenger door, where Widgery's eight-year-old daughter was seated, and the front driver's side door and mirror sustained heavy damage. Widgery was able to maneuver around Wilson's vehicle, but her vehicle then became disabled and Wilson was able to pull in front of it on the shoulder. Wilson pulled Morris out of the Widgery's vehicle without her consent and forced her into his vehicle, causing abrasions and bruises on her arms. He then grabbed her arm to prevent her from escaping from his vehicle as he drove to their residence.

As for Wilson's character, the PSI reflects that Wilson has a history of criminal and delinquent activity. As a juvenile, Wilson was placed on unsupervised probation for possession of marijuana in Texas in 1990. As an adult, Wilson has accumulated two misdemeanor convictions and eleven felony convictions, including the three felony

convictions in this case. The misdemeanor convictions, both of which occurred in Florida, were for possession of drug paraphernalia in 2002 and petit theft in 2004. His prior felony convictions in Florida include vehicle theft in 1993, possession of marijuana more than twenty grams in 2002, neglect of child without great harm in 2002, fraud – illegal use of credit cards in 2004, and uttering a forged instrument in 2004. His prior felony convictions in Georgia include burglary in 1995 and two counts of violating Georgia's Substance Control Act also in 1995. Wilson has violated his probation four times. As noted above, Wilson also has an extensive history of substance abuse.

Wilson has failed to persuade us that his aggregate ten-year sentence is inappropriate in light of his character and the nature of his offense.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.